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In the Supreme Court of the United States

OCTOBER TERM, 1993

ROSS RICHARDSON, CHAPTER 7 PANEL TRUSTEE,
PETITIONER

v.

MT. ADAMS FURNITURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether tribal sovereign immunity bars an adversary action under the Bankruptcy Code to recover the value of a preferential transfer from a business enterprise that is wholly owned and managed by an Indian Tribe and located on an Indian reservation.

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Mt. Adams Furniture is a wholly owned and managed enterprise of the Confederated Tribes and Bands of the Yakima Indian Nation. Its principal place of business is in Wapato, Washington, within the Yakima Reservation, where it constructs and sells furniture. It sold furniture on credit to Richard D. Greene and Donna J. Greene, the debtors in the underlying bankruptcy proceeding. The Greenes were doing business at the time as Custom Carpets in Townsend, Montana, outside the Reservation. Pet. App. A5; Br. in Opp. App. A1-A2.

When the Greenes failed to pay for the furniture, Mt. Adams peacefully repossessed some of it, valued by stipulation at $8779. Less than 90 days later, the Greenes petitioned for relief under Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Montana. The parties stipulated that the repossession was a preferential transfer under 11 U.S.C. 547. Pet. App. 5; Br. in Opp. App. A2.

2. Petitioner, the panel trustee for the District of Montana, commenced this adversary proceeding against Mt. Adams to avoid the transfer and to recover $8779 for the estate. Mt. Adams argued that it "[wa]s immune from suit by virtue of its status as a wholly owned enterprise of the Yakima Indian Nation." Br. in Opp. App. A2. The United States Bankruptcy Court for the District of Montana rejected that argument, holding that "the immunity enjoyed by the tribe is not enjoyed by individual members (non-tribal officials) and businesses." Pet. App. A31. The bankruptcy court entered a judgment against Mt. Adams for $8779. *Ibid.*

Mt. Adams appealed that ruling to the United States District Court for the District of Montana, which affirmed. Pet. App. A26-A27.

2. a. The United States Court of Appeals for the Ninth Circuit reversed. Pet. App. A1-A25. It began by observing that, in the absence of congressional abrogation, Indian Tribes retain "the common-law immunity from suit traditionally enjoyed by sovereign powers." *Id.* at A5, quoting *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 58 (1978). It then determined that, at common law, sovereign immunity extended to the commercial activities of a sovereign, even if those activities occurred outside of the

sovereign's jurisdiction. Pet. App. A10-A11; see also *id.* at A15.

The court of appeals rejected petitioner's argument that this Court's decisions concerning the dependent status of Indian Tribes supported the adoption of a more restrictive view of tribal sovereign immunity than sovereigns enjoyed at common law. The court observed that "the dependent status analysis had not been used by the Supreme Court in cases involving claims of tribal immunity" (Pet. App. A14); instead, the dependent status of Tribes "has been a factor in the analysis of tribal sovereignty where the tribe is affirmatively asserting its authority, whether to sell land, to deal directly with foreign governments, or try nonmembers in tribal courts." *Id.* at A14-A15. The court accordingly concluded that the Court's dependent-status analysis is inapposite here. *Ibid.*

The court of appeals also rejected petitioner's argument that a restrictive view of tribal sovereign immunity is justified by analogy to the restrictive scope of foreign sovereign immunity embodied in the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1602 *et seq.* Pet. App. A10-A11. The court reasoned that that Act illustrated both Congress's recognition that legislation is necessary to limit the scope of foreign sovereign immunity at common law, and Congress's ability to enact such immunity-restricting legislation. *Id.* at A11 & n.3. In light of Congress's decision to limit the scope of foreign sovereign immunity, the court of appeals reasoned:

> congressional silence on the issue of Indian tribal immunity is a compelling, if not controlling, factor. Since only Congress can limit the scope of tribal immunity, and it has not done so, the tribes

> retain the immunity sovereigns enjoyed at common law, including its extra-territorial component.

Id. at A11.[1]

Finally, the court of appeals rejected petitioner's argument that Congress waived tribal sovereign immunity by granting bankruptcy courts exclusive jurisdiction over property of the bankruptcy estate in 28 U.S.C. 1334(d), or by waiving the sovereign immunity of "governmental units" in Section 106(c) of the Bankruptcy Code (11 U.S.C.). Relying on *United States* v. *Nordic Village, Inc.*, 112 S. Ct. 1011 (1992), the court held that "[t]he bankruptcy court's jurisdiction over the property of the estate * * * does not operate to pierce the Yakima Nation's immunity from suit." Pet. App. A19. The court further held, also based on *Nordic Village*, that "the waiver of

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[1] The court of appeals further determined that the principles of comity that govern the immunity of one State from a suit in another State, enunciated in *Nevada* v. *Hall*, 440 U.S. 410 (1979), were inapposite in this case. Pet. App. A9-A10. The court explained (*ibid.*):

> The question in *Hall* was whether there was a constitutional impediment to California's application of its own [immunity] law as it existed in 1968, when the accident [that gave rise to the action] occurred, or whether it had to apply "the sovereign immunity doctrine as it prevailed when the Constitution was adopted" [quoting *Hall*, 440 U.S. at 418]. * * * In holding there was no Constitutional hindrance to the states' doing so, the Court left the extent of immunity between states to be resolved by the law of those states. But [the Court's] discussion also recognized that immunity between sovereigns at the common law was much broader than it is now, particularly as it relates to commercial enterprises.

sovereign immunity accomplished by § 106 does not extend to actions for money damages against Indian tribes," *id.* at A18, even assuming that Indian Tribes are "governmental units" for purposes of Section 106.

b. Judge Rymer concurred in a separate opinion. Pet. App. A20-A25. She agreed that neither the grant of jurisdiction to bankruptcy courts nor Section 106 of the Bankruptcy Code waived tribal sovereign immunity from a money judgment. Pet. App. A20. She also agreed that the common law followed a "rule * * * of absolute immunity." *Id.* at A21. She wrote separately, however, to express her view that, as the case had been briefed, it was not necessary to resolve the question whether the scope of tribal sovereign immunity at common law could be, and had been, restricted by later judicial decisions to exclude immunity for commercial activities. *Id.* at A20.

DISCUSSION

This case presents a narrow issue: whether a bankruptcy court may entertain a claim based on the Bankruptcy Code seeking a money judgment against a tribal commercial enterprise. The court of appeals correctly held that such a claim is barred by tribal sovereign immunity. That decision does not conflict with any decisions of this Court, other federal courts of appeals, or state courts of last resort. Further review is therefore unwarranted.

1. The court of appeals' decision is faithful to this Court's decisions on tribal sovereign immunity. The court correctly held that, as a tribal business located on the Yakima Reservation, Mt. Adams is immune from this adversary action in the absence of an Act of Congress waiving tribal sovereign immunity. The court also correctly held that Section 106 of the

Bankruptcy Code does not effect such a waiver. Finally, the court correctly rejected petitioner's argument that tribal sovereign immunity is, or should be, judicially limited by reference to the dependent status of Indian Tribes or by analogy to this Court's decisions concerning foreign sovereign immunity.

a. This Court has repeatedly held that an Indian tribe is immune from suit without its consent unless Congress unequivocally waives that immunity. Most recently, the Court stated that "[s]uits against Indian tribes are * * * barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991). That statement reflects longstanding precedent. *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 58 (1978) ("Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers."); see also *Three Affiliated Tribes* v. *Wold Engineering*, 476 U.S. 877, 890-891 (1986); *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940); *Turner* v. *United States*, 248 U.S. 354, 358 (1919); *Thebo* v. *Choctaw Tribe*, 66 F. 372, 374-376 (8th Cir. 1895). Petitioner contends, however, that Mt. Adams is not entitled to tribal sovereign immunity because it is a commercial enterprise that sells goods to nonmembers of the Tribe off the Yakima Reservation. See Pet. 7-9. The court of appeals correctly rejected that contention.

i. *Potawatomi* makes clear that tribal sovereign immunity bars an action for monetary relief against a tribal business located on a reservation, even if the action is based on the Tribe's commercial dealings

with nonmembers. *Potawatomi* concerned a convenience store owned and operated by the Citizen Band Potawatomi Indian Tribe of Oklahoma on land held in trust for the Tribe by the United States. 498 U.S. at 507. The Oklahoma Tax Commission sought to recover $2.7 million from the Tribe for taxes on cigarettes that the store had sold to nonmembers. *Ibid.* This Court held that, although the Tribe could be required to collect state taxes on future cigarette sales to nonmembers, tribal sovereign immunity barred a money judgment against the Tribe for the unpaid taxes on past sales to nonmembers. *Id.* at 509-511, 514.

The Court in *Potawatomi* refused the State's invitation "to construe more narrowly, or abandon entirely, the doctrine of tribal sovereign immunity." 498 U.S. at 510. The State had argued that "tribal business activities such as cigarette sales are now so detached from traditional tribal interests that the tribal sovereignty doctrine no longer makes sense [and] should be limited to the tribal courts and the internal affairs of tribal government." *Ibid.* The Court rejected that argument, observing that Congress "has always been at liberty to dispense with * * * tribal immunity or to limit it." *Ibid.* The Court thus found it significant that, "[a]lthough Congress has occasionally authorized limited classes of suits against Indian tribes," it has never authorized actions to enforce tax assessments, but has instead "consistently reiterated its approval of the immunity doctrine." *Ibid.* The Court accordingly concluded that, if the State found existing means of enforcing its tax laws inadequate, the proper forum in which to seek relief was Congress. *Id.* at 514.

ii. Tribal sovereign immunity was not compromised in this case by the fact that the furniture sold by Mt. Adams to the debtors was outside the Reservation at the time it was repossessed. This Court made clear in *Puyallup Tribe* v. *Washington Department of Game*, 433 U.S. 165, 167 (1977), that a plaintiff cannot circumvent a Tribe's immunity from suit by alleging that the conduct on which a suit is based had an off-reservation impact. In *Puyallup*, a Tribe challenged, on sovereign immunity grounds, a state-court judgment "recit[ing] that the court had jurisdiction to regulate the fishing activities of the Tribe both on and off its reservation." This Court held that the challenge was "well founded" to the extent that "the claim of sovereign immunity is advanced on behalf of the Tribe." *Id.* at 167-168. The Court accordingly vacated "the portions of the state-court order that involve[d] relief against the Tribe." *Id.* at 173. The Court did not distinguish the Tribe's on-reservation activities from its off-reservation activities for purposes of determining its immunity.[2] Furthermore,

[2] Similarly, in *United States Fidelity & Guaranty Co.*, the Court indicated that the sovereign immunity of the Choctaw and Chickasaw Nations barred a cross-claim against them "even after dissolution of the tribal government." 309 U.S. at 512; cf. *Jones* v. *Meehan*, 175 U.S. 1, 29 (1899) (Tribe retains authority over inheritance of non-reservation, non-trust property). This Court has stated that individual members of a Tribe, as opposed to the Tribe itself, are subject to "nondiscriminatory state law otherwise applicable to all citizens of the State" for off-reservation conduct. *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 149 (1973); see also *Organized Village of Kake* v. *Egan*, 369 U.S. 60 (1962). The Court has also suggested that tribal sovereign immunity might not protect tribal officials from injunctive relief in certain circumstances. See *Potawatomi*, 498 U.S. at 514. This case, however, concerns the propriety of monetary,

more, the congressional policy of fostering tribal economic development and financial independence would be seriously threatened by money judgments against Indian Tribes, see *Potawatomi*, 498 U.S. at 510, whether the conduct giving rise to the suit occurred on the reservation or off.

b. Petitioner further contends (Pet. 13-14) that Congress waived tribal sovereign immunity from adversary actions in Section 106 of the Bankruptcy Code. The court of appeals correctly concluded that that contention is foreclosed by this Court's decision in *United States* v. *Nordic Village, Inc.*, 112 S. Ct. 1011 (1992).[3]

Sections 106(a) and 106(b) are inapplicable on their face. As this Court explained in *Nordic Village*, those provisions waive the sovereign immunity of a governmental unit "only when the [governmental

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not injunctive, relief, and it involves a suit directly against a tribal entity, not individuals. As a result, this case provides no occasion for addressing a bankruptcy court's authority to enter injunctive or other non-monetary forms of relief against a Tribe or tribal officials. Compare *In re Shape*, 25 Bankr. 356, 358-360 (Bankr. 1982) (bankruptcy court had jurisdiction in action involving members of a Tribe to determine whether land held for them in trust by federal government was an asset of estate of debtors who had leased the trust land), and *In re Sandmar Corp.*, 12 Bankr. 910, 912-917 (Bankr. 1981) (civil contempt order entered against Tribe that filed proof of claim against the estate), cited in Pet. 14.

[3] As discussed above (see page 4, *supra*), in the court of appeals, petitioner contended that Congress also waived tribal sovereign immunity in 28 U.S.C. 1334(d), which grants bankruptcy courts exclusive jurisdiction over property of the bankruptcy estate. The court of appeals correctly rejected that contention, Pet. App. A18-A19, and petitioner does not renew it in this Court.

unit] has filed a proof of claim" against the estate. 112 S. Ct. at 1015. They do not apply here because no claim against the estate was filed by Mt. Adams or any other tribal entity or official. Pet. App. A17; cf. *In re Sandmar Corp.*, 12 Bankr. 910, 915 (Bankr. 1981) (Tribe waived sovereign immunity by filing proof of claim against estate).

Section 106(c) is likewise inapplicable. In *Nordic Village*, this Court held that Section 106(c) does not waive a governmental unit's sovereign immunity from monetary relief. 112 S. Ct. at 1015-1016. Thus, as the court of appeals correctly held, subsection (c) does not waive tribal immunity from the money judgment entered against Mt. Adams by the bankruptcy court. Pet. App. A18.

c. Petitioner further contends that, even in the absence of a statutory waiver of sovereign immunity, federal courts may impose restrictions on the scope of tribal sovereign immunity. The court of appeals properly rejected that contention. Pet. App. A7-A15.

As discussed earlier, this Court has made clear that federal waivers of tribal sovereign immunity from suit require an unequivocally clear expression of Congress. See page 6, *supra*. Thus, the Court in *Potawatomi* refused to modify the doctrine of tribal sovereign immunity to exclude commercial activities, in light of Congress's general approval of the doctrine as originally enunciated[4] and its demonstrated ability

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[4] See 25 U.S.C. 450n (nothing in the Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450 *et seq.*, which establishes the framework of financial assistance for Tribes in furtherance of Congress's " 'overriding goal' of encouraging tribal self-sufficiency and economic development," *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987), shall be construed as "affecting, modifying, diminishing, or

to modify that doctrine by legislation in "limited classes of suits against Indian tribes." 498 U.S. at 510.[5] In other decisions involving tribal immunity, the Court has similarly emphasized that "Congress' authority over Indian matters is extraordinarily

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otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe"); cf. 25 U.S.C. 450f(c).

[5] See, *e.g.*, *United States Fidelity & Guaranty Co.*, 309 U.S. at 509, 513; *Green* v. *Menominee Tribe*, 233 U.S. 558, 568-570 (1914); *United States* v. *Gorham*, 165 U.S. 316, 320-322 (1897); *Thebo* v. *Choctaw Tribe*, 66 F. at 373-374 & n.1.

Of particular relevance here, Congress has provided for suits against Indian Tribes for commercial activities under certain limited circumstances, which we are advised do not obtain in this case. In the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. 461 *et seq.*, Congress authorized Tribes to adopt constitutions for the conduct of their governments (IRA § 16, 25 U.S.C. 476) and to receive separate charters of incorporation to enable them to engage in business activities through separate entities (IRA § 17, 25 U.S.C. 477). Charters of incorporation issued under Section 17 of the IRA often contain a clause expressly allowing the corporation to sue or be sued. Courts have construed such clauses to waive the immunity of the incorporated entity from suit. See, *e.g.*, *Weeks Constr., Inc.* v. *Oglala Sioux Housing Authority*, 797 F.2d 668, 671 (8th Cir. 1986). Such a waiver, however, is limited to the business dealing and assets under the control of that corporation and does not extend to the Tribe in its sovereign capacity, as organized under Section 16 of the IRA. See, *e.g.*, *Seneca-Cayuga Tribe* v. *Oklahoma ex rel. Thompson*, 874 F.2d 709, 715 n.9 (10th Cir. 1989); *Ramey Constr. Co.* v. *Mescalero Apache Tribe*, 673 F.2d 315, 320 (10th Cir. 1982); see also R. Strickland, *et al.*, *Felix S. Cohen's Handbook of Federal Indian Law* 325-326 (1982). Counsel for Mt. Adams has advised us that Mt. Adams is not chartered under Section 17 of the IRA, and the parties cite no charter or other provision adopted by the Tribe that waives the immunity of Mt. Adams in the manner of the charter provisions at issue in those other cases.

broad." *Santa Clara*, 436 U.S. at 72. The decisions upon which petitioner relies do not justify a different approach here.

Petitioner relies primarily (Pet. 7-9, 14) on decisions in which this Court has recognized limits on tribal authority by virtue of the Indian Tribes' dependent status within the federal system.[6] Those decisions are inapposite. As the court of appeals recognized, this Court has applied the dependent-status principle only in cases concerning application of a Tribe's laws and regulations to others, and not in cases involving assertions of tribal sovereign immunity from suit. Pet. App. A14. Petitioner provides no justification for extending the principle to the latter class of cases. As petitioner's quotations from *United States* v. *Wheeler* and *Montana* v. *United States* show, the Court has held that the affirmative assertion of a Tribe's regulatory powers over non-members may be divested by "implication." See Pet. 8-9 (quoting *Wheeler*, 435 U.S. at 323, and *Montana*, 450 U.S. at 465). By contrast, only an explicit Act of Congress is sufficient to divest a Tribe of the

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[6] In *United States* v. *Wheeler*, 435 U.S. 313, 323 (1978), the Court stated that Indian Tribes retain "those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." See also *Washington* v. *Confederated Tribes*, 447 U.S. 134, 153-154 (1980). The Court has found an implicit divesture of tribal authority in certain cases in which a Tribe has sought to regulate the conduct of non-members. See, *e.g.*, *Montana* v. *United States*, 450 U.S. 544 (1981) (nonmember hunting and fishing on nonmember fee lands within the reservation); *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978) (Tribes lack criminal jurisdiction over non-Indians); see also *South Dakota* v. *Bourland*, 113 S. Ct. 2309, 2319-2320 (1993).

protection of sovereign immunity against suits by others. *Potawatomi*, 498 U.S. at 509.

Petitioner also errs in relying (Pet. 6) on the "restrictive view" of foreign sovereign immunity codified in the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1602 *et seq.*, which subjects foreign sovereigns to liability for certain commercial activities. See, *e.g.*, *Republic of Argentina* v. *Weltover, Inc.*, 112 S. Ct. 2160, 2165 (1992). Unlike the restriction on tribal immunity that petitioner urges this Court to adopt, the commercial-activity restriction on foreign sovereign immunity did not originate in the courts. The "restrictive" theory of foreign sovereign immunity was originally adopted by the State Department. *Verlinden B.V.* v. *Central Bank*, 461 U.S. 480, 487 (1983). The State Department's position was then binding upon the courts under the principle that "[i]t is * * * not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize." *Mexico* v. *Hoffman*, 324 U.S. 30, 35 (1945). The exception to foreign sovereign immunity that permits suits arising out of certain commercial activities then was enacted by Congress in the Foreign Sovereign Immunities Act. *Verlinden*, 461 U.S. at 487-489.

Thus, the commercial-activity exception is based on a considered and controlling judgment by the political Branches—first the Executive and then Congress—that a weighing of the competing considerations warranted dispensing with the immunity of a foreign sovereign under the specified circumstances. See *Verlinden*, 461 U.S. at 487. The experience in the analogous context of foreign sovereign immunity therefore cuts against the notion that the courts may

fashion restrictions on tribal sovereign immunity that Congress has not enacted.

2. Petitioner claims (Pet. 4, 11) that the decision below conflicts "in principle" with decisions of other federal courts and state courts. Petitioner fails to establish a conflict warranting this Court's review.

a. The two decisions of federal courts of appeals cited by petitioner (Pet. 10-11) are inapposite.

Petitioner asserts that the court in *North Dakota-Montana Wheat Growers' Ass'n* v. *United States*, 66 F.2d 573 (8th Cir. 1933), cert. denied, 291 U.S. 672 (1934), "impliedly conceded that a government is not immune from suit where it organizes and operates * * * a business corporation." Pet. 10. That assertion is incorrect. The Eighth Circuit held in *Wheat Growers* that sovereign immunity barred a counterclaim against the Federal Farm Board in a suit by the government to foreclose on the property securing a government loan. 66 F.2d at 577-578. In so holding, the court rejected the argument that the government had waived its sovereign immunity by engaging, through the Farm Board, in the "strictly private business" of making commercial loans:

> In the application of the principle that the sovereign is immune from suit in its own courts, no distinction has been drawn between strictly "governmental functions" and those which partake in part of the nature of ordinary private business. When the sovereign itself is sued, the immunity is absolute, regardless of the functions out of which the suit arose, and the suit can only be maintained by the sovereign's consent.

Id. at 578. Thus, far from conflicting with the decision below, *Wheat Growers* supports the Ninth

Circuit's conclusion that a sovereign's immunity from suit extends to suits based on commercial activities.

Nor is there any conflict between the decision below and the Tenth Circuit's decision in *Dry Creek Lodge, Inc.* v. *Arapahoe & Shoshone Tribes*, 623 F.2d 682 (1980), cert. denied, 449 U.S. 1118 (1981). The Tenth Circuit there held that the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. 1301 *et seq.*, dispensed with a Tribe's sovereign immunity from an action for money damages brought under that Act by a nonmember who had no remedy in a tribal forum. *Dry Creek Lodge*, 623 F.2d at 684-685. In our view, that holding is plainly inconsistent with *Santa Clara Pueblo*, which held that suits against a Tribe under the ICRA are barred by sovereign immunity, 436 U.S. at 58-59. Moreover, *Dry Creek Lodge* is based on the spurious premise that "there ha[d] to be a forum where the dispute can be settled," 623 F.2d at 685; the very purpose of sovereign immunity is to protect the sovereign from suits in *any* court, unless immunity has been waived. Not surprisingly, in subsequent decisions, the Tenth Circuit has avoided following *Dry Creek Lodge* by reading it very narrowly.[7] Under these circumstances, there is no reason to believe that the Tenth Circuit would follow *Dry Creek Lodge* if presented with this case, which is based, not on the ICRA, but on the Bankruptcy Code.

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[7] See, *e.g.*, *Bank of Oklahoma* v. *Muscogee (Creek) Nation*, 972 F.2d 1166, 1170 (1992); *Nero* v. *Cherokee Nation*, 892 F.2d 1457, 1460 (1989); *White* v. *Pueblo of San Juan*, 728 F.2d 1307, 1312 (1984); *Ramey Constr. Co.* v. *Mescalero Apache Tribe*, 673 F.2d 315, 319 (1982).

b. The state-court decisions cited by petitioner (Pet. 12) are likewise inapposite.

In *Padilla* v. *Pueblo of Acoma*, 754 P.2d 845, 846 (N.M. 1988), cert. denied, 490 U.S. 1029 (1989), a roofing consultant brought a state-law breach of contract claim against a tribal business for work it had performed on two building projects located off the reservation. The New Mexico Supreme Court framed the issue before it as "whether the state courts have the power and authority to exercise jurisdiction over an Indian tribe that has not waived sovereign immunity for liability claimed to arise out of the tribe's off-reservation conduct." 754 P.2d at 847. The court considered that issue to be analogous to the issue whether a court of one State may exercise jurisdiction over another State in a suit against the latter based on its conduct in the former's jurisdiction. The court gleaned from *Nevada* v. *Hall*, 440 U.S. 410 (1979), the principle that "there is no constitutional provision that prohibits a state's exercise of jurisdiction over sovereign sister states." *Padilla*, 754 P.2d at 850. "Therefore," the *Padilla* court reasoned, "the policy of a state to refrain from the exercise of jurisdiction over a sister state is solely a matter of comity." *Ibid.* Based on the similarity it perceived between state-court jurisdiction over other States and state-court jurisdiction over Indian Tribes, the court in *Padilla* held that a state court's "exercise of jurisdiction over a sovereign Indian tribe for off-reservation conduct is solely a matter of comity." *Ibid.* Because the State of New Mexico had waived its own sovereign immunity from suits in New Mexico based on the breach of a written contract, the court concluded that principles of comity did not bar such suits against Indian Tribes. *Id.* at 850-851.

As the Ninth Circuit observed, "[t]he issues involved in the *Padilla* case [we]re not before [the Ninth Circuit in this case]." Pet. App. A11. At issue in *Padilla* was whether a state court had jurisdiction over a state-law claim against a Tribe; in contrast, at issue here is whether a federal bankruptcy court has jurisdiction over a claim against a Tribe based on the federal Bankruptcy Code. The latter issue is plainly governed by federal law, and not by principles of comity. Moreover, even if *Padilla*'s comity rationale were applicable in the present case, it would not support jurisdiction over petitioner's claim against Mt. Adams. Applied here, a comity rationale would accord an Indian Tribe the same immunity as the federal government possesses in bankruptcy court. Under *Nordic Village*, the federal government plainly would be immune from a monetary judgment under the circumstances of this case. See 112 S. Ct. at 1015-1016; see also pages 9-10, *supra*. The reasoning of *Padilla* would thus lead to the conclusion that the Tribe is immune from money judgments, which is the same conclusion that the Ninth Circuit reached.[8]

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[8] That is not to say that we agree with the decision in *Padilla*, but only that there is no square conflict between that decision and the Ninth Circuit's decision in this case. Indeed, we believe that the Ninth Circuit properly criticized *Padilla* on the ground that the New Mexico court "should have looked at the scope of tribal immunity under federal law, rather than the extent of comity afforded under state law." Pet. App. A11. As the New Mexico Supreme Court itself recognized, "[a]bsent federal authorization, tribal immunity is privileged from diminution by the states." *Padilla*, 754 P.2d at 847 (citing *Three Affiliated Tribes* v. *Wold Engineering*, *supra*). Furthermore, the New Mexico Supreme Court's reliance (*id.* at 850) on *Nevada* v. *Hall*, 440 U.S. 410 (1979), was misplaced. There, the Court invoked the proposition that recognition of sovereign

Petitioner also cites (Pet. 12) *Dixon* v. *Picopa Constr. Co.*, 772 P.2d 1104 (Ariz. 1989). The Arizona Supreme Court held in *Dixon* that tribal sovereign immunity did not protect a corporation that was organized under tribal law, and all of the shares of which were owned by the Tribe, from a tort action based on an automobile accident that occurred off the reservation. *Id.* at 1107-1112. *Dixon*, like *Padilla*, is distinguishable from the present case because it concerned the exercise of state-court jurisdiction over a state-law claim. Moreover, the court in *Dixon* based its holding on a determination that the corporate defendant was not a "subordinate economic organization" of the Tribe, but was, instead, a "non-tribal business." *Id.* at 1109-1111. The *Dixon* court accordingly distinguished the case before it from prior cases in which Arizona courts had dismissed actions against "tribal business[es]" that were found to be "subordinate economic organization[s]" of a Tribe. *Id.* at 1108-1111 (citing *White Mountain Apache Indian Tribe* v. *Shelley*, 480 P.2d 654 (Ariz.

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immunity between coordinate sovereignties (*e.g.*, two independent nations) is a matter of comity between them, *id.* at 414-418, and concluded that federal law did not afford independent protection for one State in the courts of another, *id.* at 418-427. Here, by contrast, the States and Indian Tribes are distinct sovereign entities without mutuality of concessions under our constitutional framework, *Blatchford* v. *Native Village of Noatak*, 111 S. Ct. 2578, 2582-2583 (1991), and federal law does afford special protection for Indian Tribes as against the States, *id.* at 2583; *Potawatomi*, 498 U.S. at 510, 514; *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226 (1985). In any event, we agree with the Ninth Circuit's determination that *Padilla* is inapposite. Pet. App. A11. We also note that, in the five years since it was decided, *Padilla* has not been followed in any other reported judicial decision of which we are aware.

1971); *S. Unique, Ltd.* v. *Gila River Pima-Maricopa Indian Community*, 674 P.2d 1376 (Ariz. Ct. App. 1983), review denied (Jan. 4, 1984); and *Graves* v. *White Mountain Apache Indian Reservation*, 570 P.2d 803 (Ariz. Ct. App. 1977), cert. denied, 436 U.S. 931 (1978)).

The limited record in this case makes it impossible to determine whether Mt. Adams would be regarded as a "subordinate economic organization" under the principles applied by the Arizona Supreme Court in *Dixon*.[9] Thus, no clear conflict emerges between *Dixon* and the decision below. Moreover, the limited record makes this an inappropriate vehicle for resolving any conflict in approach, exemplified in *Padilla* and *Dixon*, that may exist between the courts of New Mexico and those of Arizona. Cf. *Pueblo of Acoma* v. *Padilla*, 490 U.S. 1029, 1029-1030 (1989) (White, J., dissenting from denial of certiorari). The decision of the Ninth Circuit in this case is correct and, because it arises under the federal Bankruptcy Code, is distinguishable from both the *Padilla* decision and the *Dixon* decision in those States. Review by this Court therefore is not warranted.

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[9] The stipulation merely states that "Mt. Adams Furniture * * * is a wholly owned and managed enterprise of the Confederated Tribes and Bands of the Yakima Indian Nation." Br. in Opp. App. A2. There is no information concerning Mt. Adams' status as an incorporated or unincorporated organization, the purpose or circumstances of its formation, the degree of tribal control, the relationship of its funding to the tribal treasury, or whether the Tribe has accepted or disclaimed liability for the enterprise's debts. Cf. *Dixon*, 772 P.2d at 1109-1111 (listing these factors as relevant to determining whether a business is protected by the Tribe's immunity).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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